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DOCKET FILE COPY ORIGINAL

February 28, 1996

VIA HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20006
STOP CODE: 1170

Re: Ex Parte Communication in CC Docket No. 95-185

Dear Mr. Caton:

Pursuant to Section 1.1206 of the Commission's Rules, notice is hereby given of the attached written *ex parte* communication filed on behalf of Cox Enterprises, Inc., for incorporation into the record in the above-referenced proceedings.

The *ex parte* memorandum addresses Commission jurisdiction over commercial mobile radio services ("CMRS") and interconnection between local exchange carriers ("LECs") and CMRS providers pursuant to the Omnibus Budget Reconciliation Act of 1993 and the Telecommunications Act of 1996. The *ex parte* memorandum also responds to an *ex parte* letter jointly filed by Bell Atlantic Corporation and Pacific Telesis Group in this proceeding. *See* Letter from Michael K. Kellogg, Attorney for Bell Atlantic and Pacific Telesis, to William F. Caton, Secretary, Federal Communications Commission, filed on February 26, 1996 in CC Docket No. 95-185.

An original and two copies of this notice and the attached paper are being filed with the Secretary's office. If you have any questions, please do not hesitate to contact the undersigned.

Respectfully submitted,

Laura Phillips

Werner K. Hartenberger
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Counsel for Cox Enterprises, Inc.

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February 28, 1996

MEMORANDUM

This memorandum analyzes the Commission's jurisdiction over rates, terms and conditions of interconnection between local exchange carriers ("LECs") and commercial mobile radio service ("CMRS") providers pursuant to the Telecommunications Act of 1996 ("TCA") and the Omnibus Budget Reconciliation Act of 1993 ("Budget Act"). Cox Enterprises, Inc. ("Cox") demonstrates below that the TCA preserves the Budget Act's exclusive grant of jurisdictional authority to the Commission over CMRS providers and LEC-to-CMRS interconnection. Accordingly, the Budget Act and the TCA give the Commission exclusive authority to adopt its tentative proposal to establish an interim bill-and-keep mutual compensation policy for LEC-to-CMRS interconnection in the pending *CMRS Interconnection Notice*.[1/]

I. BACKGROUND

On October 16, 1995, Cox submitted a memorandum — attached hereto — in the Commission's ongoing *CMRS Equal Access and Interconnection* docket[2/] demonstrating that the Budget Act vests the Commission with exclusive jurisdiction over CMRS providers and the rates, terms and conditions of LEC-to-CMRS interconnection.[3/] In particular, the memorandum showed that the Budget Act's amendments to Sections 2(b) and 332 of the Act "federalized" all commercial mobile radio services, thereby bringing them within the exclusive interstate jurisdiction of the Commission.[4/]

1/ *See Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers; Equal Access and Interconnection Obligations to Commercial Mobile Radio Service Providers*, Notice of Proposed Rulemaking, CC Docket Nos. 95-185, 94-54 (released January 11, 1996) ("*CMRS Interconnection Notice*").

2/ *See Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services*, Notice of Proposed Rulemaking and Notice of Inquiry, CC Docket No. 94-54, RM-8012, 9 FCC Rcd 5408 (1994) ("*CMRS Equal Access and Interconnection Notice*").

3/ *See Ex Parte* Letter from Werner K. Hartenberger, Counsel for Cox Enterprises, Inc., to William F. Caton, Secretary, Federal Communications Commission, filed in CC Docket No. 94-54 on October 16, 1995 ("Cox *Ex Parte*").

4/ *See* Cox *Ex Parte*, at 3-9.

II. DISCUSSION

In an *ex parte* letter jointly filed on February 26, 1996, Bell Atlantic Corporation ("Bell Atlantic") and the Pacific Telesis Group ("PacTel") argue that the TCA "expressly strips the Commission of authority to mandate" bill-and-keep interconnection between LECs and CMRS providers.[5/] The Bell Atlantic/PacTel *Ex Parte*'s error-filled interpretation of the TCA would stand the statutory framework and Congressional intent on their heads. In fact, the TCA preserves the Commission's exclusive jurisdiction over LEC-to-CMRS interconnection granted by the Budget Act.

A. **The Budget Act.** As the Bell Atlantic/PacTel *Ex Parte* acknowledges, "[i]nterconnection between LECs and CMRS is covered by Section 332(c)(1)(B)" of the Budget Act.[6/] The Bell Atlantic/PacTel *Ex Parte* nevertheless concludes that Section 332(c)(1)(B) deprives the Commission of jurisdiction over LEC-to-CMRS interconnection. By failing to consider the entire statutory framework of the Budget Act, however, the Bell Atlantic/PacTel *Ex Parte* grossly misreads the import of Section 332(c)(1)(B) and fails to recognize, much less appreciate the significance of, the amendment to Section 2(b).[7/] Properly read in the context of the Budget Act, Sections 2(b) and 332(c)(1)(B) vest the Commission with exclusive jurisdiction over all aspects of LEC-to-CMRS interconnection.

To begin with, the Bell Atlantic/PacTel *Ex Parte* fails to address the ramifications of the Budget Act's amendment to Section 2(b). While it is true that Section 2(b) traditionally "fences off" from Commission jurisdiction and reserves to the states authority over

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5/ *See Ex Parte* Letter from Michael K. Kellogg, Counsel for Bell Atlantic and PacTel, to William F. Caton, Secretary, Federal Communications Commission, filed in CC Docket No. 95-185 on February 26, 1996 ("Bell Atlantic/PacBell *Ex Parte*").

6/ *See id.*, at 5.

7/ The U.S. Court of Appeals for the D.C. Circuit ("Court of Appeals") has held that "it is beyond cavil that the first step in any statutory analysis, and our primary interpretive tool, is the language of the statute itself." *American Civil Liberties Union v. FCC*, 823 F.2d 1554, 1568 (D.C. Cir. 1987) (citing *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685, 105 S.Ct. 2297, 2301 (1985); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756, 95 S.Ct. 1917, 1935 (1975); *Greyhound Corp. v. Mt. Hood. Stages, Inc.*, 437 U.S. 322, 330, 98 S.Ct. 2370, 2375 (1979)).

"intrastate" matters,[8/] Congress expressly amended Section 2(b) to except Section 332 and matters thereunder from the boundaries of state authority.[9/]

The Budget Act shows that Congress delegated jurisdictional authority to the FCC with regard not only to CMRS providers but also any interconnection that CMRS providers require of any common carriers, regardless of any physically intrastate facilities or the intrastate nature of any traffic involved, and irrespective of a preemption analysis. Section 332(c)(1)(B) provides that:

> Upon reasonable request of any person providing commercial mobile service, the Commission shall order a common carrier to establish physical connections with such service pursuant to the provisions of section 201 of this Act. Except to the extent that the Commission is required to respond to such a request, this subparagraph shall not be construed as a limitation or expansion of the Commission's authority to order interconnection pursuant to this Act.

The plain meaning of the first sentence of this provision is that the FCC has authority to order *all* common carriers to establish physical interconnection with CMRS providers, upon request, and pursuant to Section 201 of the Act.[10/] The second sentence of Section 332(c)(1)(B) means that the Commission's authority to order interconnection is not altered, *except when the Commission acts in response to a CMRS provider's request for interconnection.* Accordingly, it necessarily follows that the Commission's jurisdictional authority *is* altered with respect to requests from CMRS providers for interconnection.

Comparing the terms of Sections 201 and 332(c)(1)(B), moreover, it is evident that Section 332(c)(1)(B) expands rather than limits the FCC's jurisdiction over CMRS. Section 201(a) provides:

> It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, . . . in cases where the Commission, after opportunity for hearing, finds such action necessary or

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8/ *See* 47 U.S.C. § 152(b); *Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355, 370 (1986) ("*Louisiana PSC*").

9/ Section 2(b), as amended, provides that: "*Except as provided in . . . [S]ection 332*, nothing in this shall be construed to apply or to give the Commission jurisdiction [over intrastate telecommunications]." 47 U.S.C. § 152(b) (emphasis added).

10/ Section 201 of the Act authorizes the Commission to order common carriers to provide service and to make physical interconnection available, upon request. 47 U.S.C. § 201(a).

> desirable in the public interest, to establish physical interconnections with other carriers[] . . . .[11/]

While the duty to provide interconnection under Section 201(a) extends only to those common carriers "engaged in interstate or foreign communication," Section 332(c)(1)(B) makes no distinction between interstate and intrastate common carriers, but rather, provides that "the Commission shall order *a common carrier* to establish physical connections" with CMRS providers. That, of course, is consistent with the amendment to Section 2(b), which excepts CMRS services provided pursuant to Section 332 from the statute's jurisdictional distinction between intrastate and interstate services. Furthermore, while Section 201(a) requires interstate and foreign common carriers to establish physical interconnections only with respect to "other carriers", Section 332(c)(1)(B) specifically identifies "any person providing commercial mobile service" as being within the ambit of the statute's interconnection privileges.

In contrast, the Bell Atlantic/PacTel *Ex Parte* glosses Section 332(c)(1)(B) as "simply stat[ing] that physical interconnection arrangements must be established 'pursuant to the provisions of [S]ection 201['] . . . , [and] Section 201 has never been thought to trump state rate making authority under Section []2(b)."[12/] This assertion quite plainly misunderstands the scope of the statutory changes contained in the Budget Act. CMRS was declared an interstate service and, therefore, jurisdiction over the rates, including the rates for interconnection to this interstate service, were federalized.[13/] Accordingly, state

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11/ 47 U.S.C. § 201(a).

12/ Bell Atlantic/PacTel *Ex Parte*, at 5.

13/ Under Section 2(a), the Commission has comprehensive jurisdiction over interstate and foreign communications. *See Operator Services Providers of America*, 6 FCC Rcd 4475, 4476 n.17 (1991) ("*Operator Services of America*") (quoting *Nat'l Ass'n of Reg. Util. Comm'rs v. FCC*, 746 F.2d 1492, 1501 (D.C. Cir. 1984) (interstate and foreign communications are "totally entrusted to the FCC"); *Telerent Leasing Corp. et al.*, 45 F.C.C.2d 204, 217 (1974) (the Commission has "plenary and comprehensive regulatory jurisdiction over interstate and foreign communications"), *aff'd sub nom.*, *North Carolina Util. Comm'n v. FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976)). The FCC's jurisdiction over interstate and foreign communications is distinct from state authority, "Congress having deprived the states of authority to regulate the rates or other terms and conditions under which interstate communications services may be offered." *See Operator Services of America*, 6 FCC Rcd at 4477 nn.18-19 (citing *AT&T and the Associated Bell System Cos.; Interconnection With Specialized Carriers in Furnishing Interstate and Foreign Exchange Service in Common Control Switching Arrangements*, 56 F.C.C.2d 14, 20 (1975) ("The States do not have jurisdiction over interstate communications"), *aff'd sub nom.*, *California v. FCC*, 567 F.2d 84 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1010

ratemaking authority alleged by the Bell Atlantic/PacTel *Ex Parte* to be "untrumpable" is in fact irrelevant with regard to LEC-to-CMRS interconnection.

B. The Telecommunications Act of 1996 ("TCA"). The TCA introduces requirements for LEC provision of interconnection and establishes a new general class of common carrier entity that is entitled to interconnection called a "telecommunications carrier."[14/] Because CMRS providers generally fit the definition of "telecommunications carrier", the question arises whether the interconnection provisions of the TCA alter the Commission's exclusive jurisdiction over LEC-to-CMRS interconnection. Review of the interconnection provisions of the TCA shows, however, that the Commission's exclusive jurisdiction granted by the Budget Act over LEC-to-CMRS interconnection is left undisturbed.

Section 251 of the TCA governs LEC provision of interconnection to telecommunications carriers. In particular, Subsection 251(b)(5) imposes an obligation on all LECs to establish reciprocal compensation arrangements for the transport and termination of telecommunications.[15/] In addition, Section 251(c)(2) imposes a duty upon

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(1978); *AT&T v. Pub Serv. Comm'n*, 635 F. Supp. 1204, 1208 (D. Wyo. 1985) ("It is beyond dispute that interstate communications is normally outside the reach of state commissions and within the exclusive jurisdiction of the FCC")).

14/ "Telecommunications carrier" means any provider of telecommunications services, except that such term does not include aggregators of telecommunications services. A telecommunications carrier shall be treated as a common carrier under the Act only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite services shall be treated as common carriage. 47 U.S.C. § 153(49), TCA, at § 3. "Telecommunications service" means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used. 47 U.S.C. § 153(51), TCA, at § 3. "Telecommunications" means "the transmission, between or among points specified by the user, of information of the user's own choosing, without change in the format or content of the information as sent and received." 47 U.S.C. § 153(48), TCA, at § 3.

15/ *See* 47 U.S.C. § 251(b)(5), TCA, at § 101. The TCA expressly excludes CMRS providers from the definition of a "local exchange carriers" subject to Section 251's interconnection obligations. Section 153(44) states that:

> The term "local exchange carrier" means any person that is engaged in the provision of telephone exchange service or exchange access service. Such term does not include a person insofar as such person is engaged in the provision of commercial mobile service under section 332(c), except to the extent that the Commission finds that such service should be included in the

all "incumbent"[16/] LECs to provide just, reasonable and nondiscriminatory access to unbundled network elements, at any "technically feasible point within the carrier's network."[17/]

In interpreting the status of the FCC's jurisdiction under Section 251, the "savings provision" in Section 251(i) provides important statutory guidance: "Nothing in [Section 251] shall be construed to limit or otherwise affect the Commission's authority under [S]ection 201."[18/] Thus, the FCC's authority to set parameters for interconnection under Section 251 is *in addition to* that it already possesses under Section 201 of the Act. The legislative history regarding Section 251(i), moreover, supports this reading:

> New subsection 251(i) makes clear the conferees' intent that the provisions of new section 251 are in addition to, and in no way limit or affect, the Commission's existing authority regarding interconnection under section 201 of the Communications Act.[19/]

Accordingly, any authority granted the FCC under the interconnection provisions of Section 251 only amplifies the power the FCC already possessed. Because the Budget Act already gives the FCC exclusive jurisdiction to respond to requests of CMRS providers for interconnection to LEC networks under Section 201(a) of the Act, Section 251 of the TCA "in no way limits or affects" this authority.

By concluding that the TCA "expressly strips" the Commission of jurisdiction over local interconnection agreements, however, the Bell Atlantic/PacTel *Ex Parte* notably fails

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definition of such term.

47 U.S.C. § 153(44).

16/ Incumbent LECs are defined as including all traditional LECs that, upon enactment, have interstate access charge tariffs on file or are members of the National Exchange Carriers Association's ("NECA") interstate access tariff. *See* 47 U.S.C. § 251(h), TCA, at § 101. All telephone companies that participate in the distribution of carrier common line ("CCL") revenue requirement, pay long term support to NECA common line tariff participants, or receive payments from the transitional support fund administered by NECA are deemed to be members of the association. 47 C.F.R §69.601(b). A person or entity that, on or after enactment, is a successor or assignee of a NECA member is also an incumbent LEC.

17/ *See* 47 U.S.C. § 251(c)(2).

18/ 47 U.S.C. § 251(i), TCA, at § 101.

19/ *See* Conference Report, at 123.

even to mention Section 251(i) or the legislative history. Furthermore, the provision of the TCA upon which Bell Atlantic and PacTel do rely, Section 251(d)(3)(A), supports the contrary proposition. Section 251(d), taken as a whole, lends support to the interpretation that the TCA does not limit the FCC's exclusive jurisdiction over LEC-to-CMRS interconnection.

Section 251(d) directs the FCC to complete a rulemaking to implement the TCA's interconnection provisions. With regard to state interconnection regulations, Section 251(d)(3) provides that the Commission may not preclude certain state commission actions and establishes a three-pronged test for preemption. Section 251(d)(3) arguably expands the Commission's jurisdiction with regard to interconnection because its three-pronged standard for FCC preclusion of state regulation is much looser than *Louisiana PSC*'s preemption standard.

Under *Louisiana PSC*, the FCC may not preempt state regulation if: (i) it is possible to separate the intrastate and interstate portions of the service; and (ii) the state regulation is consistent with the federal purpose.[20/] Unlike *Louisiana PSC*, however, Section 251(d)(3) does not require a finding that the Commission determine it impossible to separate the interstate and intrastate portions of telecommunications in order for the Commission to preempt state regulation. Rather, the three-pronged preemption test under Section 251(d)(3) provides that:

> the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that: (A) establishes access and interconnection obligations of local exchange carriers; (B) is consistent with the requirements of this section; *and* (C) does not substantially prevent implementation of the requirements of [Section 251] and the purposes of [the competitive markets section of the TCA].[21/]

Section 251(d)(3) thus means that the FCC may not preempt a state when the state regulation meets *all three prongs* of the test. The logical corollary of the preemption test enunciated under Section 251(d)(3), however, is that the Commission *may* preclude enforcement of any state regulation, order or policy that *either*: (i) does not involve access and interconnection obligations of local exchange carriers; *or* (ii) is not consistent with the requirements of Section 251 or substantially prevents implementation of Section 251; *or* (iii) does substantially prevent implementation of the purposes of Section 251 or the competitive markets section of the TCA. While the two-pronged *Louisiana PSC* test requires the FCC to show both inseverability of intrastate and interstate matters *and* state frustration of a federal purpose to justify preemption, therefore, Section 251(d)(3) shifts the

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20/ *See* 476 U.S. at 372-376.

21/ *See* 47 U.S.C. § 251(d)(3), TCA, § 101 (emphasis added).

burden to authorize the FCC to preempt any state regulation that fails to meet any single prong of the three-part statutory test.

The TCA, moreover, preserves the Budget Act's expansion of the FCC's jurisdiction with regard to CMRS providers. Section 253 of the TCA authorizes the FCC to preempt state regulations that impose barriers to entry by telecommunications carriers. *See* 47 U.S.C. § 253. Section 253(e) provides, however, that "[n]othing in this section shall affect the application of section 332(c)(3) to commercial mobile service providers." Section 332(c)(3) prohibits states from regulating rates and entry with respect to CMRS providers and gives the Commission exclusive authority to determine whether a state petition to regain rate or entry regulation authority has met the statutorily required showing.[22/] Accordingly, Section 253(e) provides that the Commission's exclusive authority over CMRS interconnection and state petitions to regain authority to regulate CMRS is unaffected by the enactment of the TCA. Moreover, any contrary conclusion would be inconsistent with both the intent of the Budget Act — to free CMRS from a state-by-state substantive regulatory process and the TCA — which confirms that states may not maintain barriers to competitive entry.

Finally, the Bell Atlantic/PacTel *Ex Parte* also fails to consider the TCA's treatment of wireless carriers under the provisions governing Bell Operating Company ("BOC") entry into interLATA markets. Section 271(c)(1) of the TCA requires that a BOC demonstrate that it has entered into at least one interconnection agreement with a "facilities-based competitor" as a competitive precondition to its entry into interLATA markets. Section 271(c)(1) also specifically provides that an interconnection agreement with a cellular carrier is not a sufficient predicate for BOC interLATA entry authority. Given that Congress thus considers cellular service to be in an entirely different competitive market from landline local exchange service (which is plainly reflected in both the Budget Act and the

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22/ The Commission also has sole discretion to "grant or deny" any state petition for authority to regulate the rates of CMRS providers. Section 332(c)(3)(A) grants the Commission exclusive authority to decide whether a state has sufficiently proven either that market conditions with respect to CMRS fail to adequately protect intrastate CMRS subscribers from discriminatory or unjust and unreasonable rates or that such non-competitive market conditions exist and CMRS is a "replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within [a] State." 47 U.S.C § 332(c)(3). This provision (and the Commission's rules) plainly contemplate that a state demonstrate that CMRS service has replaced or has become a substitute for a substantial number of landline telephone subscribers before a petition could be granted. *See* 47 C.F.R. §20.13, State Petitions for authority to regulate rates. Even if a state has sufficiently justified grant of a petition for rate regulation authority, the duration of such authority may be limited "as the Commission deems necessary." 47 U.S.C. § 332 (c)(3)(A). In either case it is the Commission, using rules it adopted pursuant to its implementation of the Budget Act, that is required to assess any state petitions.

TCA), the TCA cannot "expressly strip" the Commission of authority over LEC-to-CMRS interconnection as the Bell Atlantic/PacTel *Ex Parte* asserts.

III. CONCLUSION

The provisions of the TCA support the conclusion that the FCC has exclusive jurisdiction over all LEC-to-CMRS interconnection rates and traffic.[23/] The interconnection provisions of Section 251, in conjunction with the "savings clause" in Section 251(i), explicitly state that the FCC's authority to establish requirements for LECs to provide reciprocal compensation is in addition to authority it already possesses under Section 201(a) of the Communications Act of 1934. Contrary to the Bell Atlantic/PacTel *Ex Parte*, moreover, Section 251(d)(3) expands rather than limits the Commission's authority with regard to interconnection by loosening the *Louisiana PSC* preemption test. Furthermore, the preemption provisions regarding state barriers to entry by telecommunications service providers contained in Section 253 are consistent with the Budget Act's elimination of state rate and entry regulation over CMRS providers. The exclusion of cellular service as a predicate to BOC interLATA entry authority under Section 271(c)(1) of the TCA further supports the conclusion that the TCA does not alter the Commission's exclusive jurisdiction over CMRS and LEC-to-CMRS interconnection under the Budget Act or its ability to establish an interim bill-and-keep mutual compensation policy.

23/ The pricing standards set forth in Section 252(d) are applicable only to the process of state approval of interconnection agreements, and in no way limit the Commission's authority under the Budget Act regarding LEC-to-CMRS interconnection.

ATTACHMENT

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October 16, 1995

VIA HAND DELIVERY

Mr. William F. Caton
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

EX PARTE

Re: Docket CC No. 94-54

Dear Mr. Caton:

Please find attached a Memorandum and duplicate copies submitted by Cox Enterprises examining the scope of the FCC's jurisdiction over rates and terms of interconnection between CMRS providers and LECs.

If you have any questions, please do not hesitate to contact the undersigned.

Respectfully submitted,

Laura Phillips

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Leonard J. Kennedy
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October 16, 1995

MEMORANDUM

This memorandum examines the scope of the Federal Communications Commission's ("Commission") jurisdiction over the rates and terms of interconnection between commercial mobile radio service ("CMRS") providers and local exchange carriers ("LECs"). Cox demonstrates that because of changes to the Commission's jurisdiction over CMRS under the 1993 Budget Act, the Commission has exclusive rate jurisdiction over CMRS, including rates associated with both interstate and intrastate CMRS interconnection between LECs and CMRS providers. Accordingly, there is no need for the Commission to preempt the states to order the payment of mutual compensation for the termination of traffic on the respective LEC and CMRS networks.

I. BACKGROUND

The Communications Act contains a dual regulatory structure for interstate and intrastate wireline communications. Section 2(a) of the Act confers upon the Commission exclusive jurisdiction over "all interstate and foreign communication by wire or radio . . . ."[1] Under this jurisdictional mandate, the Commission is empowered to regulate common carriers engaged in interstate communications. Section 2(b) limits Commission jurisdiction "with respect to [] charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications . . . ."[2] As the Commission has sought effective means to deregulate communications equipment or introduce new communications services into the market it has occasionally preempted states with inconsistent policies. In cases where the Commission has overstepped its jurisdictional boundary, courts have reversed the Commission.[3]

The Commission's jurisdiction over communications provided by mobile radio is entirely different from the Commission's jurisdiction over landline communications. The Omnibus Budget Reconciliation Act of 1993 (the "Budget Act") fundamentally realigned the

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[1] *See* 47 U.S.C. § 152(a).

[2] *See* 47 U.S.C. § 152(b).

[3] *See Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355 (1986) ("Louisiana PSC"); *see also California v. FCC*, 798 F.2d 1515 (D.C. Cir. 1986); *Nat'l Ass'n of Reg. Util. Comm'rs v. FCC*, 880 F.2d 422 (D.C. Cir. 1989).

balance of federal/state jurisdiction over CMRS. In the Budget Act Congress amended Section 2(b) and Section 332 and reclassified all existing mobile services as either CMRS or private mobile radio services ("PMRS").[4] One of the main purposes of the Budget Act was to foster the nationwide growth of wireless telecommunications by establishing a uniform federal regulatory framework for all mobile services.

Amended Sections 332 and 2(b) rewrote the traditional boundaries of jurisdiction over mobile services. The states no longer enjoy rate and entry regulation authority over CMRS providers.[5] Rather, their authority is limited to overseeing the "terms and conditions" of CMRS and PMRS services provided to end users. The Budget Act thus eliminated state substantive jurisdiction over wireless common carrier services. Substantive regulation of CMRS has become federalized and, because jurisdiction over CMRS is no longer divided, authority over CMRS interconnection is no longer jurisdictionally split.

Arguing that amended Sections 332 and 2(b) expressly preempts state authority over intrastate CMRS rates but does not expressly authorize the Commission to regulate intrastate CMRS rates, some have suggested that Congress may have created a "jurisdictional void" under which neither the Federal government nor the states has regulatory authority over the formerly intrastate CMRS rates.[6] As demonstrated in this memo, this theory is contrary to the plain language and legislative history of the Budget Act. Commission adoption of this jurisdictional void theory would nullify the Budget Act and Congress's intent that Commission direct the evolution of wireless networks on a nationwide basis.

II. Commission Jurisdiction Over CMRS to LEC Interconnection Is Consistent With the Plain Meaning and Legislative History of Amended Sections 332 and 2(b).

Review of the Budget Act and its legislative history confirms the FCC's sole authority over CMRS to LEC interconnection. The Budget Act expands the Commission's jurisdiction to occupy the field, rather than maintaining prior limits on or restricting the Commission's jurisdiction over intrastate rates for mobile services.[7] Accordingly, the

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[4] *See* 47 U.S.C. § 332(d).

[5] *See* 47 U.S.C. § 332(c)(3). As discussed below, the Budget Act provides that states can petition the FCC for authority to reestablish substantive regulation over CMRS providers if they can demonstrate that CMRS has become a substitute for traditional landline telephone service for a substantial portion of the public within the state.

[6] *See* Cellular Resellers Association Petition for Reconsideration, in PR Docket No. 94-105 at 6 (filed June 19, 1995).

[7] *See* McCaw Cellular Communications, Inc., Reply Comments, in PR Docket No. 94-105

(continued...)

Commission need not preempt to regulate the entire interconnection arrangement between a LEC and CMRS provider; such preemption has already occurred by statute.

1. Section 2(b). The Budget Act places intrastate CMRS interconnection rates under the Commission's exclusive jurisdiction by its amendments to Section 332(c) and 2(b) of the Act. Section 2(a) gives the Commission exclusive jurisdiction over all interstate telecommunications.[8] Section 2(b) "fences off"[9] from Commission jurisdiction all "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier . . . ."[10] Under the Supreme Court's interpretation of Section 2(b) in the pre-Budget Act *Louisiana PSC* decision, the Commission is denied jurisdiction over all aspects of intrastate telecommunications that are severable from the interstate portion or do not conflict with a Federal policy.[11]

The Budget Act, however, amended Sections 332(c) and 2(b) and supersedes *Louisiana PSC* with regard to state jurisdiction over intrastate CMRS. The Commission in *Louisiana PSC* argued that it had authority under Section 220 of the Act to preempt state depreciation regulations. In rejecting this argument, the Court noted that the main clause in Section 2(b) — ". . . nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to" intrastate telecommunications — is itself a "rule of statutory construction . . . . [that] presents its own specific instructions regarding the correct approach to the statute which applies to how we should read [Section] 220."[12]

Congress amended the initial clause introducing Section 2(b) as a *direct limitation* on the main clause of Section 2(b), which *Louisiana PSC* termed a "rule of statutory construction." The adverbial clause limiting the main clause of Section 2(b), as most recently amended by the Budget Act, provides:

> *Except as provided in sections 223 through 227 of this title, inclusive, and Section 332* . . . . nothing in this chapter

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(...continued)
(filed March 3, 1995) ("McCaw Reply Comments").

[8] *See* 47 U.S.C. § 152(a).

[9] *See Louisiana PSC*, 476 U.S. 370.

[10] *See* 47 U.S.C. § 152(b).

[11] *See Louisiana PSC*, 476 U.S. 372-376.

[12] *See Louisiana PSC*, 476 U.S. at 373, 376-7 n.5.

> shall be construed to apply or to give the Commission jurisdiction [over intrastate telecommunications].[13]

As shown below, Section 332 grants the Commission sole authority over *all* CMRS rates and entry issues. Accordingly, the plain language of Sections 2(b) and 332 of the Act, as amended by the Budget Act, reserves exclusive jurisdiction over all substantive regulation of CMRS to the Commission, without regard to their former characterization as intrastate. Stated differently, Section 2(b)'s reservation of jurisdictional authority over wireless intrastate common carrier telecommunications to the states, discussed in *Louisiana PSC*, has been eliminated.[14] The Supreme Court found in *Louisiana PSC* that the Commission's decision to override Section 2(b) had no legal foundation. It also observed, however, that Congress could provide a foundation.[15] In enacting the Budget Act in 1993, Congress did precisely what the *Louisiana PSC* found lacking in 1986 — Congress specifically delegated authority to the Commission to regulate CMRS.

Congress has amended Section 2(b) in similar circumstances to remove state jurisdiction where it was necessary or appropriate to advance a federal purpose. In restricting Section 2(b) in 1978 to except amendments to the pole attachment provisions in Section 224 of the Act, Congress stated that the amendment:

> modifies existing [S]ection 2(b) . . . which limits the jurisdiction of the Commission over connecting carriers to [S]ections 201 through 205 of . . . the [A]ct. Since [the amended pole attachment provision] would give the Commission CATV pole attachment regulatory authority over connecting communications common carriers otherwise exempt from the provisions of the 1934 [A]ct . . . , a conflict arises between the limitation on the Commission's jurisdiction of [S]ection 2(b) and its duty to regulate under proposed new [S]ection 224 . . . . [The amendment to Section 2(b)] removes this conflict by removing the jurisdictional limitations of [S]ection 2(b) as they would otherwise apply to proposed [S]ection 224.[16]

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[13] *See* 47 U.S.C. § 152(b) (1995) (emphasis added).

[14] *See, e.g.*, McCaw Reply Comments, at 5-6; GTE Service Corporation *Ex Parte* letter to William Caton from Carol Bjelland filed in PR Docket No. 94-105 on March 3, 1995 at 1 ("GTE *Ex Parte*").

[15] *See id.*, 476 U.S. at 373-4.

[16] *See* S. Rep. No. 95-580, 95th Cong., 1st Sess. 26 (1978), *reprinted in* 1978 U.S.C.C.A.N.

(continued...)

Similarly, when Congress enacted the telephone relay service ("TRS") provisions by adding new Section 225 to the Communications Act (as part of the Americans with Disabilities Act of 1990) and the telemarketing fraud provisions by adding new Section 228 to the Communications Act (in the Telephone Consumer Protection Act of 1991), a reference to these provisions was included in Section 2(b) to remove any limitations on the Commission's jurisdiction over the substantive provision's subject matter.[17]

By amending Section 2(b) to associate Section 332 with the provisions of the Act governing pole attachments, TRS requirements, and telemarketing, Section 332 read in conjunction with Section 2(b) vests the Commission with jurisdiction over CMRS. This conclusion is compelled because the adverbial clause in Section 2(b) regarding the Act's pole attachments, TRS, telemarketing and CMRS provisions nullifies the Court's direction in *Louisiana PSC* that the main clause of Section 2(b) be a "rule of statutory construction" specifying that no other provisions of the Act be construed to give the Commission jurisdiction over intrastate telecommunications.

2. Section 332. Section 2(b), as amended, dictates that the substantive provisions of Section 332 will determine the extent of the Commission's jurisdiction over CMRS. Section 332, in turn, as amended by the Budget Act, grants the Commission sole authority to regulate all interstate and "intrastate" rate and entry aspects of CMRS. In other words, Section 332 has so "federalized" CMRS services that the notion of an "intrastate" or "local" portion of the service has no effect on the Commission's jurisdiction.[18] A reading of

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(...continued)
109, 134.

[17]*See* Americans With Disabilities Act of 1990, Pub. L. No. 101-336, Title IV, § 401(a), reprinted in 1990 U.S.C.C.A.N. 104 Stat. 327, 366-369 (1990); Telephone Consumer Protection Act of 1991 ("TCPA"), Pub. L. No. 102-243, reprinted in 1991 U.S.C.C.A.N. 105 Stat. 2394 (1991); Statement of President Upon Signing TCPA, *reprinted in* 1991 U.S.C.C.A.N. 1979 (the President stated that he "signed the bill because it gives the Federal Communications Commission ample authority to preserve legitimate business practices . . . [and] [the] flexibility to adapt its rules to changing market conditions.").

[18]In the *Land Mobile Services* docket, for example, the Commission exercised exclusive jurisdiction over specialized mobile radio ("SMR") systems finding that wireless SMRs operate "without regard to state boundaries or varying local jurisdictions" and on a "nation-wide basis." *See An Inquiry Relative to the Future Use of the Frequency Band 806-960 MHz; and Amendment of Parts 2, 18, 21, 73, 74, 89, 91, and 93 of the Rules Relative to Operations in the Land Mobile Service Between 806-960 MHz, Memorandum Opinion and Order*, Docket No.18262, 51 F.C.C.2d 945, 972-3 (1975) ("*Land Mobile Services*"), *aff'd sub nom., National Ass'n of Reg. Util. Comm'rs v. FCC*, 525 F.2d 630, 646-7 (D.C. Cir. 1976) ("*NARUC*"). In 1982, Congress codified the Commission's finding in *Land Mobile Services* by amending Section 301 of the Act to "make clear that the Commission's jurisdiction over radio communications extends to intrastate as well as interstate transmissions" of all private land mobile radio services ("PLMRS"). *See* H. Rep. No. 97-

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Section 332 according to canons of statutory interpretation as expressed in *Louisiana PSC* and other cases supports this conclusion.

As the Supreme Court explained in *Louisiana PSC*, "the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency."[19] The statutory design of Section 332(c)(3)(A), which preempts state authority over rate and entry regulation of CMRS "[n]otwithstanding sections 152(b) and 221(b) of this title . . .",[20] shows that states are preempted from regulating intrastate CMRS rates and entry "notwithstanding" and, therefore, "without regard" to any residual jurisdiction a state may claim under Section 2(b) of the Act.[21] This provision also authorizes the Commission to approve or reject state petitions to grandfather existing CMRS rate regulation or apply for new CMRS rate regulation.

The Budget Act's use of the phrase "terms and conditions" to delimit the scope of state authority not otherwise preempted is different from the phrase "terms and conditions" of interconnection. In preserving state authority over "terms and conditions" of CMRS, the Budget Act refers to "such matters as customer billing information and practices and billing disputes and other consumer protection matters."[22] The Commission retains exclusive jurisdiction, however, to ensure that "terms and conditions" of interconnection between LECs and CMRS providers are just, reasonable and nondiscriminatory.[23] Because mutual compensation can be viewed as relating not only to rates but to "terms and conditions" of interconnection, the Commission retains exclusive jurisdiction to ensure the availability of interconnection between LECs and CMRS providers on a just, reasonable and nondiscriminatory basis.[24]

(...continued)
765, 97th Cong., 2d Sess., at 31-2 (1982) reprinted in 1982 U.S.C.C.A.N. 2237 (citing *Fisher's Blend Station Inc. v. Tax Comm'n of Washington State*, 297 U.S. 650, 655 (1936) ("all radio signals are interstate by their very nature"). In the interests of regulatory parity, the Budget Act extends the Title III jurisdictional rule that private mobile services "are interstate by their very nature" to *all* commercial mobile radio services as well.

[19]*See id.*, 476 U.S. at 374.

[20]*See* 47 U.S.C. § 332(c)(3)(A).

[21]*See* GTE *Ex Parte*, at 2.

[22]*See* H.R. Rep. No. 103-111, 103rd Cong., 1st Sess., at 260 ("House Report").

[23]See 47 U.S.C. §§ 151, 154(i), and 201.

[24]Because the Budget Act federalizes substantive regulation of CMRS, moreover, the
(continued...)

By preempting state rate and entry authority over CMRS, Section 332 reserves to the Commission jurisdiction to "occupy the field" of substantive CMRS regulation.[25] In *Louisiana PSC*, the Supreme Court stated that "the critical question in any pre-emption analysis is always whether Congress intended that *federal regulation supersede state law*."[26] The Supreme Court's observation in *Louisiana PSC* that, absent Congressionally delegated authority, "an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State"[27] further supports the conclusion that Section 332 authorizes the Commission to regulate CMRS.

The forbearance provisions of Section 332(c)(1)(A) also confirm that the overall design of the statute is to vest jurisdiction over CMRS with the Commission. By authorizing the Commission to forbear from enforcing any provision of Title II, except Sections 201, 202 and 208, Section 332(c)(1)(A) places with the Commission the responsibility to determine whether enforcement of any common carriage regulation is necessary "to ensure that the charges, practices, classifications, or regulations for or in connection with [CMRS] are just and reasonable and are not unjustly or unreasonably discriminatory."[28]

Furthermore, Section 332(c)(1)(C) directs the Commission to conduct "annual reports" reviewing competitive market conditions with respect to CMRS. As part of the statutorily required public interest finding the Commission must make prior to specifying a provision for forbearance, Section 332(c)(1)(C) requires the Commission to consider whether forbearance or enforcement of a provision "will promote competitive market conditions" for CMRS providers. By bestowing on the Commission sole responsibility for identifying the "competitive market conditions" to determine whether regulation is necessary to ensure just,

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[24](...continued)
interconnection provided by LECs to CMRS providers is entirely interstate in nature.

[25]*See id*; *see also FMC Corp. v. Holliday*, 498 U.S. 52, 58 (1990) (a preemption clause in the ERISA statute "is conspicuous for its breadth. It establishes as an area of exclusive federal concern the subject of every state law that 'relates [to]' an employee benefit plan governed by ERISA"); *Gade v. Nat'l Solid Wastes Management Ass'n.*, 112 S.Ct.2374, 2384-5 (1992) (OSHA provision authorizing Secretary of Labor to approve or reject state hazardous waste removal regulations based on statutorily specified conditions "assumes that the State loses the power to enforce all of its occupational safety and health standards once approval is withdrawn. The same assumption of exclusive federal jurisdiction in the absence of an approved state plan is apparent . . ."); *Broyde v. Gotham Tower, Inc.*, 13 F.3d 994 (6th Cir. 1994).

[26]*See id.* 476 U.S. at 369 (emphasis added) (citing *Rice et al. v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947)).

[27]*See Louisiana PSC*, 476 U.S. at 374.

[28]*See* 47 U.S.C. § 332(c)(1)(A)(i).

reasonable and nondiscriminatory rates, Section 332(c)(1)(C) contemplates Commission authority to regulate CMRS, without regard to interstate or intrastate jurisdictional boundaries. Section 332(d), moreover, expressly states that the statutory definitions of the phrases "commercial mobile service" and "private mobile service" are to be "specified by regulation by the Commission," and that the statutory phrases "interconnected service" and "public switched network" are to be "defined by regulation by the Commission."[29/] Delegating to the Commission the authority to define what constitutes CMRS, PMRS and "interconnected service," further exhibits Congressional intent as required by *Louisiana PSC* "that Federal regulation supersede state law."[30/] Accordingly, the statutory framework established by Sections 2(b) and 332, as amended by the Budget Act, demonstrates Congress's intent to delegate to the Commission exclusive authority to direct CMRS substantive regulation.

Congress's intent to invest the Commission with exclusive authority over CMRS is also manifest in the provisions in the Budget Act that provide the states with an opportunity to petition for rate regulation authority. The Commission has sole authority over CMRS, unless and until a state files a petition for rate regulation authority and the Commission approves it.[31/] The Commission also has sole discretion to "grant or deny" any state petition for authority to regulate the rates of CMRS providers. These provisions grant the Commission exclusive authority to decide whether a state has sufficiently proven either that market conditions with respect to CMRS fail to adequately protect intrastate CMRS subscribers from discriminatory or unjust and unreasonable rates or that CMRS is a "replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within [a] State."[32/] Even if a state has sufficiently justified grant of a petition for rate regulation authority, the duration of such authority may be limited "as the Commission deems necessary."[33/] In either case it is the Commission, using rules it adopted pursuant to its implementation of the Budget Act, that is required to assess any state petitions.

The legislative history also supports the conclusion that the Budget Act confers upon the Commission exclusive jurisdiction over substantive regulation of CMRS providers.

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[29]*See* 47 U.S.C. § 332(d).

[30]*See id.*, 476 U.S. at 369.

[31]47 U.S.C. § 332(c)(3)(A).

[32]47 U.S.C § 332(c)(3). This provision (and the Commission's rules) plainly contemplate that a state demonstrate that CMRS service has replaced or has become a substitute for a substantial number of landline telephone subscribers before a petition could be granted. *See* 47 C.F.R. §20.13, State Petitions for authority to regulate rates.

[33]*See* 47 U.S.C. § 332 (c) (3)(A).

The specific jurisdictional provisions of Section 332, according to the House Report, are intended:

> . . . [t]o foster the growth and development of mobile services that, *by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure.*[34]

In adopting the Senate's amendment of Section 2(b) to reserve exclusive jurisdiction to the Commission over all substantive regulatory matters involving CMRS, the full Committee explained in the Conference Report that:

> [t]he Senate Amendment contains a technical amendment to Section 2(b) of the Communications Act *to clarify that the Commission has the authority to regulate commercial mobile services.*[35]

These statements reinforce the interpretation that the Budget Act's amendments to Sections 2(b) and 332(c) gave the Commission jurisdiction over CMRS rates and entry without regard to their intrastate nature.

III. The Commission Has Sole Jurisdiction Over CMRS Interconnection Issues Because CMRS Is Part of an Interstate Network.

As discussed above, the Budget Act extends to the Commission exclusive jurisdiction over intrastate CMRS rates, regardless of the physically intrastate nature of the facilities.[36] But, even if the purpose of the Budget Act were not entirely transparent, the Commission and courts have consistently held that jurisdiction over communications services is to be determined by the nature of the communications, not the physical location of facilities. A call carried on intrastate facilities is jurisdictionally an interstate communication, subject to federal regulation, when the call is connected to an interstate network.[37] As shown below, since CMRS is part of an interstate network, CMRS calls are inherently interstate in nature and thus subject to the Commission's sole jurisdiction.

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[34] *See* H.R. Rep. No. 103-111, at 260 (emphasis added).

[35] *See*, H.R. Rep No. 102-213, 103d Cong., lst Sess. 494, 497 (1993) ("Conference Report") (emphasis added).

[36] *See* 47 U.S.C. §§ 152(b), 332(c)(3)(A).

[37] *See New York Telephone v. FCC*, 631 F.2d 1059, 1066 (2d Cir. 1980).

For example, in *Bell System Tariff Offerings*, the Commission held that it has exclusive jurisdiction over rates, terms and conditions associated with interconnection to intrastate facilities when the local facilities are "an essential link in [] interstate and foreign communications services."[38] In *Lincoln Telephone*, the Court of Appeals rejected the state's argument that the Commission lacked jurisdiction over Lincoln Telephone because all of the company's facilities were located within the State. The Court of Appeals found that:

> The courts . . . have never adopted such a narrow view of the Commission's jurisdiction. Rather, those facilities or services that substantially affect provision of interstate communication are not deemed to be intrastate in nature even though they are located or provided within the confines of one state.[39]

Consistent with the boundaries on the Commission's jurisdiction as enunciated in *Louisiana PSC*, the Commission has jurisdiction, over rates, terms and conditions of interconnection, even if physically intrastate, when the facilities or services at issue substantially affect provision of interstate CMRS communications.[40] In this regard, both Congress in establishing the CMRS category of services in the Budget Act and the

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[38]*See Bell System Tariff Offerings of Local Distribution Facilities for Use by Other Common Carriers*, 46 F.C.C. 2d 413, 417 (1974) ("Bell System Tariff Offerings"), *aff'd sub nom., Bell Tel. Co. of Pennsylvania v. FCC*, 503 F.2d 1250 (3d Cir. 1974) (citing *Telerent Leasing Corp.* et al., *Memorandum Opinion and Order*, Docket No. 19808, 45 F.C.C.2d 204, 220 (1974), *aff'd sub nom., North Carolina Util. Comm'rs*, 537 F.2d 787 (4th Cir. 1976), *cert. denied*, 429 U.S. 1027 (1976) (the Commission exercised exclusive jurisdiction over interconnection of customer premises equipment to the nationwide switched public telephone network); *United Dep't of Defense, et al.*, 38 F.C.C.2d 803 (Review Board, 1973), *aff'd* FCC 73-854 (the Commission asserted exclusive jurisdiction over Dial Restoration Panel ("DRP") equipment that was part of a nationwide defense communications system even though the facilities were used in part for transmission of intrastate communications)).

[39]*See Lincoln Telephone*, 659 F.2d at 1109 n.85 (citing *Idaho Microwave, Inc. v. FCC*, 328 F.2d 556 (D.C. Cir. 1964); *North Carolina Utilities Comm'n v. FCC*, 552 F.2d 1036, 1044-1048 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977); *North Carolina Utilities Comm'n v. FCC*, 537 F.2d 787 (4th Cir..), *cert denied.*, 429 U.S. 1027 (1976)).

[40]Although *Bell System Tariff Offerings* and *Lincoln Telephone* are pre-*Louisiana PSC* decisions, the holding that the Commission possesses exclusive jurisdiction to order interconnection to intrastate facilities remains valid and survives *Louisiana PSC*. In a post *Louisiana PSC* case affirming a Commission decision ro preempt state regulation of BOC enhanced Centrex services, the Court of Appeals stated that "[e]ven if Centrex were a purely intrastate service, the FCC might well have authority to preemptively regulate its marketing if -- as would appear here -- it was typically sold in a package with interstate services." *See Illinois Bell Tel. Co. v. FCC*, 883 F.2d 104, 113 n.7. (D.C. Cir. 1989); *see also Petition of the Continental Telephone Company of Virginia for a Declaratory Ruling that it is not Fully Subject to the Commission's Jurisdiction Under the Communications Act of 1934*, 2 FCC Rcd 5982, 5984 (Com. Car. Bur. 1987); *Declaratory Ruling on Application of Section 2(b)(2) of the Communications Act of 1934 to Bell Operating Companies*, 2 FCC Rcd 1750 (1987).

Commission in implementing the Budget Act have found commercial mobile radio services to form an interstate and nationwide wireless communications network. The legislative history of the interconnection provisions of Section 332 states, for example, that Congress "considers the right to interconnect an important one which the Commission shall seek to promote, since interconnection serves to enhance competition and advance a seamless national network."[41] Defining the market for CMRS, moreover, the Commission observed that the "direction is away from a 'balkanized view'" that sees cellular, SMRs, paging, *etc.*, competing in separate markets" and noted that ownership concentration and service offering expansion is moving the majority of the wireless industry toward nationwide geographic markets.[42]

As the Commission has previously recognized, CMRS networks are part of a nationwide wireless "network of networks," and mutual compensation models for interconnection between landline LECs and CMRS providers are essential to the rapid and competitive build out of nationwide wireless networks. The Commission is licensing PCS using Major Trading Areas (MTAs) and Basic Trading Areas (BTAs) that do not respect state boundaries. The Commission holds exclusive jurisdiction over the rules of the road for interconnection between LECs and CMRS providers, and all other issues regarding rates, terms and conditions of interconnection between such providers. This view is entirely consistent with the approach the Commission took in its recent examination of CMRS-to-CMRS interconnection, where the Commission did not attempt to separate interconnection into federal and state portions.[43]

A conclusion that the Commission lacks jurisdiction to regulate local CMRS rates is, therefore, contrary to the jurisdictional realignment of Budget Act and pre-Budget Act case law. Under *Bell System Tariff Offerings* and *Lincoln Telephone* and contrary to the *CMRS Second Report and Order*, the Commission — wholly apart from Section 332(c) — retains jurisdiction under Sections 4(i), 2(b) and 332(a) of the Act to order LECs to tariff rates, terms and conditions for interconnection to CMRS facilities, in spite of any "local" or intrastate aspects of CMRS interconnection rates. As Congress and the Commission now both have officially determined, CMRS is part of the interstate public switched telephone network. Given that interconnection between LECs and CMRS providers, and a mutual compensation model is vital to the competitive deployment of a wireless "network of

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[41] *See* House Report, at 261.

[42] *See Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, First Report*, FCC 95-317, at ¶¶ 59, 63-4 (released August 18, 1995).

[43] *See Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services*, Notice of Proposed Rulemaking and Notice of Inquiry, CC Docket No. 94-54, 9 FCC Rcd 5408, 5460 (1994).

networks," the Commission retains exclusive jurisdiction over rates, terms and conditions of interconnection.

IV. The Commission Must Restate its Jurisdiction to Avoid Confusion.

In the *CMRS Second Report and Order*, the Commission exercised its statutory authority to forbear from applying Section 203 of the Act to require CMRS providers to tariff their rates.[44] In reaching this conclusion the Commission observed that "revised Section 332 does not extend the Commission's jurisdiction to the regulation of local CMRS rates."[45] As discussed above, this conclusion reflects a pre-Budget Act, traditional Section 2(b) analysis over the scope of the Commission's CMRS jurisdiction that is inaccurate. This jurisdictional statement must be clarified to conform with the Commission's actual jurisdiction over CMRS-to-LEC interconnection.

Several parties seeking clarification or reconsideration have questioned the Commission's jurisdictional findings in the *CMRS Second Report and Order*. For example, McCaw and MCI urge the Commission to clarify that it retains exclusive jurisdiction with regard to mutual compensation between LECs and CMRS providers regardless of the degree of physically intrastate facilities involved. Pursuant to the analysis laid out above, Cox supports such clarification.

The Commission has exclusive jurisdiction to require LECs and CMRS providers to comply with a federal model of mutual compensation for interconnection. The language of the Budget Act demonstrates that Congress has granted the Commission sole authority over the rates, terms and conditions of CMRS interconnection, without regard to the physically intrastate location of facilities or the otherwise intrastate nature of a call. Other jurisdictional theories would nullify Congressional intent to establish an interstate, nationwide wireless "network of networks." There thus is an urgent need to correct the misstatement in the *CMRS Second Report and Order*'s concerning the full extent of the Commission's jurisdiction. The Commission cannot and should not forbear from jurisdiction specifically found to be in the public interest and granted to the Commission by the Budget Act. The Commission rather should state that it has exclusive jurisdiction to adopt uniform federal policy governing rates, terms and conditions associated with CMRS interconnection, regardless of the physically "local" or intrastate situation of CMRS facilities.

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[44] *See Second Report and Order*, 9 FCC Rcd 1411, at 1479-1480 (1994) ("CMRS Second Report and Order").

[45] *See id.*, 9 FCC Rcd at 1480.